

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ROBERT ALAN DRAYTON,

Defendant-Appellant.

UNPUBLISHED

October 16, 2003

No. 241282

Oakland Circuit Court

LC No. 2001-179874-FH

Before: Kelly, P.J., and Cavanagh and Talbot, JJ.

PER CURIAM.

In this domestic violence case, defendant appeals as of right from his jury conviction of assault with intent to do great bodily harm less than murder, MCL 750.84; domestic violence, MCL 750.812; and malicious destruction of property valued at less than \$200, MCL 750.377(A)(1)(d). The trial court sentenced defendant as a second habitual offender, MCL 769.10, to a term of five to fifteen years' imprisonment for the assault conviction; thirty-nine days for the domestic violence conviction and ninety days for the malicious destruction conviction. We affirm the conviction and remand for proceedings consistent with this opinion.

I. Offense Variable Scorings

Defendant first argues that the trial court erred in scoring Offense Variable (OV) 3 at twenty-five points, in scoring OV 7 at fifty points, and in scoring OV 9 at ten points. Defendant preserved his challenges to the scoring of the three offense variables by objecting at sentencing. *People v McGuffey*, 251 Mich App 155, 165-166; 649 NW2d 801 (2002). Appellate review of sentencing guidelines calculations is limited. *People v Dilling*, 222 Mich App 44, 54; 564 NW2d 56 (1997). A sentencing court has discretion in determining the number of points to be scored provided that evidence of record adequately supports a particular score. *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002).

Defendant argues that the trial court erred in assessing twenty-five points for OV 3, and contends that the proper scoring for this offense variable is ten points for the bodily injury requiring medical treatment that the victim sustained. We agree.

OV3 requires a trial court to assess ten points when "bodily injury requiring medical treatment occurred to a victim" and twenty-five points when a "life threatening or permanent incapacitating injury occurred to a victim." MCL 777.33(1). Here, the evidence clearly

indicated that defendant's girlfriend, Lisa Johnson, suffered extensive bodily injury that required medical treatment. However, the prosecutor did not provide the trial court with any evidence or expert testimony to establish that the victim's injuries, as extensive as they were, were life threatening or permanently disabling. Consequently, the court erred in its scoring decision. Nonetheless, we conclude that this error is harmless. Had the guidelines been correctly scored with respect to OV 3, defendant's minimum sentence range would still remain at between twenty-nine and seventy-one months as a second habitual offender.

Defendant next argues that the trial court erred in scoring OV 7 at fifty points and that it should have scored this offense variable at zero. We disagree. Former MCL 777.37, in effect at the time of defendant's sentencing before amended by 2002 PA 137, directs a trial court to assess fifty points on OV 7 if the victim "was treated with terrorism, sadism, torture, or excessive brutality." MCL 777.37(1). The statute defined "terrorism" as "conduct designed to substantially increase the fear and anxiety a victim suffers during the offense." MCL 777.37(2)(a); *Dilling, supra* at 55. The word "sadism" is defined as "conduct that subjects a victim to extreme or prolonged pain or humiliation and is inflicted to produce suffering or for the offender's gratification." MCL 777.37(2)(b). The statute offers no definition for excessive brutality. MCL 777.37(2)(a-b). According to *Random House Webster's College Dictionary*, 1997, "excessive" indicates a condition "beyond the usual, necessary, or proper limit or degree," and "brutality" means cruelty or savagery.

There was evidence that the victim was treated with "terrorism, sadism, . . . or excessive brutality." Given that defendant crashed through the trailer door window to get at the victim, chased her through the trailer, subjected her to choking, pushed her head through the glass of a window, attempted to disrobe her and force her to roam the trailer park naked, and then returned from the hospital where the police took him for medical treatment to subject her to a frenzied attack with a baseball bat and followed her to a neighbor's house to conduct a frenzied attack on the neighbor's property, the scoring of OV 7 at fifty points was supported by the evidence.

Defendant next argues that the trial court erred in scoring OV 9 at ten points and asserts that the proper scoring for this offense variable should be zero. Specifically, defendant argues that his neighbor, James Armstrong, was not a victim in this case because defendant was not charged with any offense directed against Armstrong. This argument is without merit. OV 9 is to be scored at ten points if two to nine victims were involved. MCL 777.39(1) (c). The instructions provide that "each person who was placed in danger of injury or loss of life" is counted as a victim. MCL 777.39(2)(a). OV 9 does not necessarily require that a separate criminal offense have occurred with respect to Armstrong. See *People v Kimble*, 252 Mich App 269, 274; 651 NW2d 798 (2002), lv granted 468 Mich 870; 659 NW2d 231 (2003).

In this case, after defendant beat her with a baseball bat, the victim went to Armstrong's home to contact the police. Defendant followed her and proceeded to break the windows on Armstrong's home while threatening to kill both Armstrong and the victim. Defendant's frenzied attack on Armstrong's house and his threats to kill Armstrong, particularly in light of the fact that defendant had severely injured the victim with a baseball bat, placed Armstrong in danger of an injury or loss of life.

II. Defendant's Sentencing as a Second Habitual Offender

Defendant next argues that his was improperly sentenced as a second habitual offender when the prosecution failed to prove that his prior felony conviction in New Jersey would have been a felony under Michigan law. Specifically, defendant argues that because he could have only been convicted of misdemeanor aggravated assault in Michigan, the New Jersey felony conviction cannot be used for sentencing enhancement purposes.

This issue is not preserved because defendant failed to object below. *People v Carter*, 462 Mich 206, 214; 612 NW2d 144 (2000). Accordingly, our review is limited to plain error affecting a substantial right. *People v Carines*, 460 Mich 750, 774; 597 NW2d 130 (1999). This Court should reverse only when the defendant is actually innocent or the error seriously affected the fairness, integrity or public reputation of the judicial proceedings. *Id.*

A defendant is sentenced as an habitual offender if the defendant committed a prior felony either in this state or in a different state. MCL 769.10(1). However, the act requires that the offense be a felony under Michigan law, irrespective of whether the offense was a felony in the state or country where it was committed. *People v Quintanilla*, 225 Mich App 477, 479; 571 NW2d 228 (1997).

In the supplemental information, defendant was charged as a second habitual offender on the basis of a New Jersey conviction of aggravated assault. Aggravated assault is a felony in New Jersey. The record shows that defendant expressly admitted that his prior conviction in New Jersey was a felony but he did not admit that the prior conviction would have been a felony had it been committed in Michigan pursuant to MCL 750.81a(2)-(3). There is no information on the record concerning the facts of the New Jersey conviction or whether that conviction involved a domestic assault and battery. Accordingly, we remand this matter to allow the prosecutor to show that the facts of the New Jersey conviction would support a felony conviction in Michigan. *Quintanilla, supra*.

III. Defendant's Standard 11 Brief

In his Standard 11 Brief on appeal, defendant raises several issues all of which are not preserved for appellate review. Defendant first argues that the trial court committed error requiring reversal because it failed to hold a hearing to determine defendant's competency to stand trial. We disagree. Defendant waived this issue inasmuch as he stated that he accepted the results of the medical examiner's evaluation and he requested to withdraw his insanity defense. Under these circumstances, the trial court was not obliged to conduct a competency hearing. The intentional relinquishment of a known right constitutes a waiver which extinguishes any alleged error. *Carter, supra* at 215-216.

Defendant next argues that he was denied his constitutional right to select his own counsel or to chose to represent himself when the trial court declined to allow him to dismiss his trial counsel. We disagree. Although defendant requested the trial court to allow his to dismiss his counsel, he has failed to preserve this claim because his objection below is not based on the same ground as that raised on appeal. *People v Stimage*, 202 Mich App 28, 30; 507 NW2d 778 (1993). We review this unpreserved issue for plain error on the record affecting a substantial right. *Carines, supra*.

Defendant asserts that he had wished to proceed in propria persona. A defendant's request to dismiss his counsel and proceed in propria persona *must* be unequivocal. *People v Dennany*, 445 Mich 412, 432; 519 NW2d 128 (1994). The record indicates that defendant did not request to proceed in propria persona. On appeal defendant does not point to any error in this record and he does not demonstrate any prejudice. Therefore, his claim is without merit.

Defendant asserts that he also wanted to hire his own attorney. An indigent defendant is constitutionally guaranteed the right to counsel, but not entitled to the appointment of the attorney of his choice. *People v Ginther*, 390 Mich 436, 441; 212 NW2d 922 (1973); *People v Flores*, 176 Mich App 610, 613; 440 NW2d 47 (1989). A defendant is entitled to have assigned counsel replaced upon a showing of adequate cause, provided that the substitution of counsel will not unreasonably disrupt the judicial process. *Id.* at 613-614. The record shows that defendant never informed the court that he wished to hire his own counsel and there is nothing on this record to establish adequate cause for defendant's request to dismiss his counsel. Defendant has failed to demonstrate prejudice as a result of the denial of his request to dismiss his counsel.

It appears that defendant next raises a claim of prosecutorial misconduct in that he asserts that the prosecutor knowingly elicited false testimony from a key witness to secure defendant's conviction. The issue is not preserved because defendant did not raise it before the trial court. *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001). Therefore, this Court's review is for plain error affecting a substantial right. *Carines, supra*.

The test of prosecutorial misconduct is whether the defendant was denied a fair and impartial trial. *Watson, supra*. Here, there is nothing to explain what defendant is arguing on appeal about a "star witness" recanting his trial testimony. Defendant does not identify for this Court the "star witness" but specifically uses the male pronouns of "he" and "him" when referring to the "star witness." Presumably, defendant refers to Armstrong's testimony. However, the letter that defendant attached to his Standard 11 brief on appeal in support of his argument indicates that it was Johnson who may have at one point wanted to dissociate herself from the case. The court record does not include a transcript of the arraignment in which the alleged key witness had previously testified. Further, defendant does not brief his argument on appeal nor does he point to anything in this record that may assist this Court in deciphering his claim. Simply, there is nothing upon which this Court can determine the issue. An appellant may not merely announce his position and leave it to this Court to discover and rationalize the basis for his claims. *People v Kelly*, 231 Mich App 627, 640-641; 588 NW2d 480 (1998). Issues insufficiently briefed are deemed abandoned on appeal. *People v Van Tubbergen*, 249 Mich App 354, 364; 642 NW2d 368 (2002).

Defendant next argues that he was denied the effective assistance of counsel for a number of reasons and he requests this Court to remand the matter for an evidentiary hearing. Because defendant did not move below for a new trial or a *Ginther* hearing, this Court's review is limited to mistakes apparent on the record. *People v Snider*, 239 Mich App 393, 423; 608 NW2d 502 (2000). To establish ineffective assistance of counsel, defendant must prove: (1) that his counsel's performance was so deficient that he was denied his right to counsel and he must overcome the strong presumption that counsel's performance was not sound trial strategy; and (2) that this deficient performance prejudiced him to the extent there is a reasonable probability

that but for counsel's error, the result of the proceedings would have been different. *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001).

Defendant argues that his counsel failed to appear at his arraignment, which required another attorney who was unfamiliar with the case to represent defendant. Defendant does not explain how this would have affected the outcome of the proceedings. An appellant may not merely announce his position and leave it to this Court to discover and rationalize the basis for his claims. *Kelly, supra*.

Defendant next asserts that his counsel "committed perjury or forgot" when counsel misinformed the trial court about the date of the trial. Defendant's claim is without merit. He does not show how this alleged error may have affected the outcome of his trial that was held about two months after the alleged error occurred.

Defendant next argues that his counsel was not prepared for trial on January 31, 2002, the initial date for the trial. Again, we find no error requiring reversal. Defendant does not explain how this may have affected the outcome of his trial that took place about two months later, on March 15, 2002.

Defendant also asserts that his counsel attempted to pressure him into accepting a *Cobbs*¹ agreement. Again, defendant does not explain how this may have affected the outcome of the proceedings, particularly when defendant did not accept the *Cobbs* agreement, but proceeded to a jury trial.

Finally, defendant asserts that his counsel failed to provide him with the medical examiner's forensic report and "Special Discovery" so that defendant could assist counsel in his defense. On appeal, defendant does not refute his counsel's explanation on the record at a hearing that defendant was fully aware of the contents of the forensic report and that a copy of the report was mailed to defendant. Defendant does not explain what he means by "Special Discovery" or how he could have assisted in his defense based on the information contained in the alleged discovery materials and the forensic report. Given the above, defendant has failed to demonstrate any plain error on the record. Thus, he was not deprived of the effective assistance of counsel.

Defendant next argues that the trial court caused error requiring reversal when it diverted the attention of the jury by pacing back and forth at the time when the defense was cross-examining the prosecutor's witnesses. Defendant failed to raise this issue below and we review this unpreserved issue for plain error on the record that affected a substantial right. *Carines, supra*. On this record, there is nothing to indicate that the attention of the jury was diverted by any improper conduct by the trial court. Defendant does not point out to the transcript portions of the cross-examination of the witnesses where the trial court allegedly stood up and walked around and we do not find anything that references the matter in the record. There is nothing to show plain error. Accordingly, defendant's claim is without merit.

¹ *People v Cobbs*, 443 Mich 276; 505 NW2d 208 (1993).

Defendant next argues that his due process rights were violated because the transcript of the January 31, 2000, hearing was not a true and accurate account of the proceeding. Defendant failed to raise this issue below and we review this unpreserved issue for plain error on the record that affected a substantial right. *Carines, supra*. In order to overcome the presumption that a transcript is accurate and be entitled to relief, a petitioner must satisfy the following requirements: he must (1) seasonably seek relief; (2) assert with specificity the alleged inaccuracy; (3) provide some independent corroboration of the asserted inaccuracy; (4) describe how the claimed inaccuracy in the transcription has adversely affected the ability to secure postconviction relief. *People v Abdella*, 200 Mich App 473, 475-476; 505 NW2d 18 (1993).

Defendant asserts three errors in the January 31, 2002 hearing transcript. First, the transcript failed to reflect that his counsel misinformed the trial court about the purpose for that day's hearing, second, the transcript failed to reflect that another prosecutor was present at the hearing, and third, the transcript lacked an affidavit by the court reporter affirming the transcript's accuracy. Defendant does not describe how these three inaccuracies have adversely affected the proceedings below and there is nothing to show that these alleged inaccuracies would have made a difference. Thus, defendant's claim is without merit.

Defendant next argues that he was denied his constitutional rights to a trial by jury and to due process by the reassignment of his trial to a different judge on the morning of the trial and the new judge was unfamiliar with pending matters such as defendant's competency hearing and defendant's request to dismiss his counsel. Specifically, defendant argues that his case was reassigned even though the previous judge was not disqualified. We disagree. The court rules permit reassignment of cases when a judge is disqualified or "for other good cause." MCR 8.111(C) provides in pertinent part that "[i]f a judge is disqualified or for other good cause cannot undertake as assigned case, the chief judge may reassign it to another judge by a written order stating the reason." Here, the record indicates that defendant's case was reassigned to a new judge for the "efficient administration of justice." Defendant does not provide anything to show that the efficient administration of justice was not served in this case.

Defendant further argues that the judge was unfamiliar with two pending proceedings in the case, namely, the competency hearing and defendant's request to dismiss his counsel. As previously discussed, these two claims are without merit because they were not pending matters at the time the case was reassigned.

Defendant finally argues that he was denied his right to a public trial because the trial court prevented defendant's family and friends from entering the courtroom during trial. Defendant does not point to anything on the record to show that this had occurred and our review of the record reveals nothing. Defendant fails to provide anything to show any plain error or prejudice.

Defendant's conviction is affirmed. We remand the case for the trial court to determine whether defendant's New Jersey felony conviction would constitute a felony in Michigan. If so,

defendant's sentence stands. If not, defendant's sentence is vacated and defendant shall be resentenced. We do not retain jurisdiction.

/s/ Kirsten Frank Kelly

/s/ Mark J. Cavanagh

/s/ Michael J. Talbot